91-559

Supreme Court, U.S.
FILED
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LEWIS G. ROBINSON, PETITIONER

v.

CLEVELAND STATE UNIVERSITY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Sixth Circuit Court of Appeals erroneously apply the clear and convincing evidence standard to the Plaintiff as used in the libel action in Jack Anderson, Et Al., v. Liberty Lobby, Inc., 477 U.S. 242 upon which it based its Decision in affirming the F.R.C.P. Rule 56 Summary Judgement Ruling of the District Court as expressed by Justice Rehnquist and Chief Justice Burger, and Justice Brennan in their Dissent.

2. Did the Trial Judge over step his function in erroneously granting Summary Judgement when he, with Appellate Court approval, disregarded the Petitioner's Affidavit containing facts which showed that two members of the Hiring Committee for Cleveland State University knew Petitioner socially and professionally for over 18 years and thus knew that he was Black which will determine the outcome of the Case involving racial discrimination and is the only genuine issue involved in this Case that the Jury must decide.

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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LEWIS G. ROBINSON,

Petitioner,

vs.

CLEVELAND STATE UNIVERSITY,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Lewis G. Robinson, respectfully prays that a Writ of Certiorari Issue to review the Judgement and Opinion of the Sixth Circuit Court of Appeals issued May 2nd, 1991 because no other remedy exist at Law or Equity to prevent irreparable injury and the permanant denial of Due Process and Equal Protection cast upon him by the Appellate Court's Decision.

That the Court of Appeals erroneously affirmed the District Court's granting Summary Judgement based upon the libel case of Jack Anderson Et Al., v. Liberty Lobby, Inc., 477 U.S. 242 (1986), wherein it was confusingly decided that clear and convincing evidence must be submitted in order for the Non-Movant to prevent the granting of Summary Judgement.

JURISDICTION

Jurisdiction of this Court is sought under Supreme Court Rule 17.1 (A) (B) (C).

This Pro Se Appellant, Lewis G. Robinson, brought this Action originally pursuant to 42 U.S.C. Sec. 2000E, ETSEQ., Title V11 OF THE Civil Rights Act of 1964 and 29 U.S C. Sec. 621 Et Seq., the Age Discrimination Act of 1967.

The Petitioner/Plaintiff, is seeking an Order from this Court to remand this Case to the District Court for Trial.

The Summary Judgement was based upon the genuine critical issue of fact as to whether the Defendant, Cleveland State University knew the Plaintiff was Black.

The Trial Court based its Decision upon an Affidavit by an Administrator (Garrison) who was far removed from the Selection Committee and had no personal knowledge nor did he state under Oath that anyone or all of the five (5) members of the Committee deny knowing Plaintiff was Black. It merely states that no designation of race or age were requested or submitted on the application.

Plaintiff's Affidavit states that he knew and had socially associated with the only Black member and her husband for over 25 years and had known and worked professionally with the Chairman of the Committee for at least 18 years. The Chairman of the Committee Norman Krumholz, was selecting a replacement for his position, that of Director of The Center For Neighborhood Development, and undoubtly exercised a substantial influence over the decision to select the 40 year old white male chosen for the job.

The person chosen and several resumes, list the birth dates and the age of all others can be substantially determined by dates of education and graduations.

The Court should have taken special notice of the fact that the Defendant did not submit an Affidavit from not one of the five (5) member Selection Committee rebuting or denying Plaintiff's Affidavit that he knew two of them.

The fact that Plaintiff's Affidavit states he knew two of the Committee Members and stated facts to support his allegations of facts were sufficient genuine facts in dispute to submit to a Jury. Those facts were sufficient to determine the out come of the Case and the District Court categorically ignored these critical facts and erroneously declared as a matter of Law that these facts had no probative value worth a Jury's consideration.

The Court's decision was arbitrary, capricious, and prejudicial to the Plaintiff and resulted in a gross Denial of Due Process and Equal Protection.

The Court should, just as any Lay person Juror would be more than curious, wonder why and how a person with a Law Degree and many years of experience in the Fields required for the position open, could

apply for six positions in the Urban Studies Department of Cleveland State University over a two-year period and not be interviewed for not one job to which he submitted his application and Resume, particurlarly when he visited in person, and inquired of the first position, and he overheard the Secretary state: "You are saying Mr. Robinson was over qualified?" That position was re-opened to seek more applicants.

The Defendant make light of the fact that complaints of age and race discrimination were only filed by Plaintiff in the positions of Director of Neighborhood Developer and Neighborhood Planner. The reason for that is that an applicant will be denied a job because you will be called a chronic complainer, retalitation will be visited upon you. Some employerers ask well educated Blacks if you have ever filed a Discrimination Complaint or do you feel you have ever been discriminated against in order to gauge your independence of thinking or aggressiveness. Of course, if you say "no" and a check is made, you are fired for lying or you will be classified as a potential trouble

maker.

These are the realities in America for African-Americans.

(1) Summary Judgment and Judgment on the § 5 - genuine issue of material fact -

Under Rule 56(c) of the Federal Rules of Civil Procedure, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgement; the requirement is that there be no "genuine" issue of "material" fact.

(2) Summary Judgment and Judgment on the Pleadings § 5 - determination - judge's function -

Under Rule 56 (C) of the Federal Rules of Civil Procedure, the judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.

Summary Judgment and Judgment on the pleadings § 5 - findings of fact -

There is no requirement that the trial judge make findings of fact in ruling on a motion for summary judgment under Rule 56 (c) of the Federal Rules of Civil Procedure.

(3) Summary Judgment and Judgment on the Pleadings §5;Trial §§ 46, 48, 79, 194-summary judgment and directed verdict -

jury determinations

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether the judge is ruling on a motion for summary judgment or on a motion for directed verdict.

Summary Judgment and Judgement on the Pleadings § 5 - inferences.

On a motion for summary judgment, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the nonmovant's favor.

Summary Judgment and Judgment on the Pleadings § 5 - judicial caution.

Trial courts should act with caution in granting summary judgment, and may deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

The facts presented above and the Rules of Procedure and Responsibility of the District Court clearly shows that the Trial Court was in error in granting Summary Judgement, and the Appellate Court compounded this error as shown in the final paragraph of Anderson v. Liberty Lobby, Supra,:

"in sum, a Court ruling on a Motion For Summary Judgement must be guided

> by the New York Times "clear and convincing" evidentary in determining whether a genuine issue of actual malice exists - that is whether the evidence presented is such that a reasonable Jury might find that actual malice had been shown with convincing clarity. Because the Court of Appeals did not apply the correct standard in reviewing the District Courts Grant of Summary Judgement, we vacate the Case for further proceedings consistent with this Opinion."

It is clear to this Petitioner and to this Court that in reading the above paragraph in preparation of the Sixth Circuit's Decision in this Case, the Clerk clearly and unconsciously failed to detect the word malice and that the Anderson Case and New York Times Cases involved libel with malice a fore thought whereas this Case involves Race and Age Discrimination which one has to prove only the existence of a genuine issue in dispute wherein reasonable people may differ and by Law and Procedure, we let a Jury decide the issue, - which in this Case is, did the two members of the Hiring Committee of Cleveland State University know the Plaintiff, Robinson, was Black. If yes, he wins his Case. If not, he lose.

That is the proposit in that the Trial Court should have submitted to a Jury by denying the Motion For Summary Judgement.

> Adickes v. S.H. Kress and Co., 398 U.S. at 157. The moving Defendant had failed to rebut the Plaintiff's Prima Facie Case. The essence of the confession which easily arose and caused the erroneous Decision of the Appellate Court and District Court in this Case is succinctly analyzed in the dissenting Opinion by Justice Brennan in Anderson v. Liberty Lobby upon which Petitioner's Case was decided by both the District Court and Appellate citing the Anderson Case in their Decision.

CONCLUSION

The Petitioner humbly request this Court to issue a Clear Mandate that the Anderson Case Ruling is strictly to be used in libel Cases and that this Case be remanded to the District Court for Trial.

HUMBLY SUBMITTED,

Lewis G. Robinson

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CERTIFICATE OF SERVICE

A copy of this Motion has been served upon Defendant via U.S. Certified Mail this 7/27/91 day of July, 1991 to Atty. Daniel J. O'Loughlin, 1800 Huntington Bldg., Cleveland, Ohio 44115.

Lewis G. Robinson

Lewis G. Robinson, Pro Se

APPENDIX A.

NO. 90-3940

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5/30/91
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed: 5/02/91
Leonard Green, Clerk

LEWIS G. ROBINSON,

Plaintiff-Appellant

v.

CLEVELAND STATE UNIVERSITY; BOARD OF TRUSTEES OF CLEVELAND STATE UNIVERSITY,

Defendants-Appellees

O R D E R 89 CV 258

BEFORE: KRUPANSKY and BOGGS, Circuit Judges, and DUGGAN, District Judge*

This pro se appellant, Lewis G. Robinson, appeals from the district court's order granting summary judgment in favor of the defendants, Cleveland State University and its Board of Trustees, in this suit pursuant to 42 U.S.C. § 2000e, et seq., Title V11 of the Civil Rights Act of 1964, and 29 U.S.C. § 621, et seq. the Age Discrimination in Employment Act of 1967.

This case has been referred to a panel of the court

pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and the record, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Robinson, a Black male over 50 years of age, alleged that he was denied employment with the Urban Center at the University's College of Urban Affairs on the basis of his race and age. Robinson alleged that between 1987 and 1989, he applied for six positions of employment with the Urban Center. The University only has a record of five applications. Robinson only filed charges of alleged employment discrimination against the University with the Equal Employment Opportunity Commission (EEOC) with respect to two of the positions he applied for: Director of the Center for Neighborhood Development and Neighborhood Planner. The EEOC issued Robinson a right-to-sue letter with respect to those two positions.

In his suit against the Defendants, Robinson alleged that he was fully qualified for these positions and was denied them because of his race and age. He

sought monetary damages and further requested a mandatory order requiring the University to employ him in the first available position for which he is minimally qualified.

The defendants filed a motion for summary judgment, with supporting attachments, alleging that there was no evidence that defendant's decisions were taken for discriminatory purposes. After reviewing the defendants' motion and Robinson's response, the district court granted the motion. Robinson's subsequent motion for reconsideration was denied in a marginal order entered October 2, 1990. Robinson disagrees with the district court's decision and brings this timely appeal.

Upon consideration, we conclude that summary judgment on Robinson's claims was proper, as Robinson did not establish the existence of any genuine issue of material fact. (See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Moreover, the additional claim of retaliation presented on appeal will not be addressed as it was not first presented in the district

court for consideration. (See White v. Anchor Motor Freight, Inc., 899 F.2d 555, 559 (6th Cir. 1990)

Accordingly, the order of the district court is affirmed under Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

A True Copy

Attest:

Leonard Green, Clerk

By /s/ Teresa Beitke
Deputy Clerk

Issued As Mandate: May 24, 1991

COSTS; None

* The Honorable Patrick J. Duggan, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

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October Term, 1991

LEWIS G. ROBINSON,
Petitioner,

vs.

CLEVELAND STATE UNIVERSITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT CLEVELAND STATE UNIVERSITY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, Cleveland State University (the "University"), asserts that the only issues which can properly be presented on the basis of the record in this case are:

1. Whether, on the University's Motion for Summary Judgment, Lewis G. Robinson ("Petitioner") failed to come forward with specific, significantly probative evidence sufficient to support a claim for racial discrimination in employment brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.* ("Title VII"); and

2. Whether, on the University's Motion for Summary Judgment, Petitioner failed to come forward with specific, significantly probative evidence sufficient to support a claim for age discrimination in employment brought pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. Sections 621 *et seq.* ("ADEA").

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Order of the United States Court of Appeals for the Sixth Circuit (May 2, 1991) A1

Memorandum Opinion of the United States District Court (September 13, 1990) A4

Order of the United States District Court (September 13, 1990) A12

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Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.* ..... *passim*

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BRIEF OF RESPONDENT CLEVELAND STATE UNIVERSITY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

As the University cannot determine from the service copy of the Petition whether the opinions below have been furnished to the Court, the Order of the U.S. Court of Appeals for the Sixth Circuit appears in the Appendix at A1. The Memorandum of Opinion and the Order of the U.S. District Court for the Northern District of Ohio, Eastern Division, appear in the Appendix at pp. A4 and A12, respectively.

JURISDICTION

The jurisdiction of this Court arises under 28 U.S.C. Section 1254(1), 29 U.S.C. 626(c) and 42 U.S.C. Section 2000e-5(c) and (j).

The Order of the U.S. Court of Appeals for the Sixth Circuit was filed on May 2, 1991.

STATUTES INVOLVED

Insofar as the University can determine, Petitioner's contentions do not address substantive issues pertaining to the interpretation of either Title VII or the ADEA. Petitioner claims that both the District Court and the Court of Appeals misunderstood the summary judgment standard set forth by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

STATEMENT OF THE CASE

Cleveland State University is an urban state university created by the Ohio General Assembly. Petitioner is a black male over fifty (50) years of age who unsuccessfully sought employment with the Urban Center of the University's College of Urban Affairs on various occasions between 1987 and 1989. Petitioner, who has a law degree, had applied for five positions: Senior Technical Specialist II, Assistant Director of Leadership Training and Development Program, Director of Communications and Development, Director, Center for Neighborhood Development ("CND") and Neighborhood Planner. In his Amended Complaint, Petitioner alleged that he was rejected for those positions at the Urban Center on the basis of his race and age. He, however, admitted in his Amended Complaint that he had only filed charges of alleged employment discrimination against the University with the Equal Employment Opportunity Commission ("EEOC") with respect to his applications for the positions of Director of CND and Neighborhood Planner (R. 1: First Amended Complaint at paras. 7, 8, 10, 13 and 17).

The University had hired a black female under forty as a Neighborhood Planner. A white male over 40 was hired as Director of the CND.

After discovery was completed and Petitioner had dismissed various constitutional claims, Petitioner's counsel, with Petitioner's consent, withdrew from the case. Petitioner, who apparently completed his legal education in the 1950's but has not been licensed to practice law, was allowed a total of 30 days to retain new counsel but he did not do so. A Motion for Summary Judgment in favor of all Defendants on all remaining

claims was then filed within the time periods set by the District Court (R. 20: Notice of Withdrawal; R. 26: Motion for Summary Judgment).[1]

Petitioner, *pro se*, filed a brief in opposition to the motion. His brief contained a rambling discussion of his background, quotes from documents nowhere authenticated, as well as clippings from local newspapers concerning race relations at the University (R. 27: Plaintiff's Motion in Opposition to Summary Judgment).

On September 13, 1990, the District Court issued a Memorandum of Opinion and an Order, granting the Motion for Summary Judgment on all counts. The District Court ruled that the claims pertaining to the positions of Senior Technical Specialist II, Assistant Director of Leadership Training and Development Program and Director of Communications and Development were not properly before the Court due to Petitioner's failure to file charges against the University with the EEOC with respect to those positions. *See* 42 U.S.C. Section 2000e-5; 29 U.S.C. Section 626(d); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974); and *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 60 L. Ed. 2d 609, 99 S. Ct. 2066 (1979). The District Court further found that, although Petitioner could establish a *prima facie* case of age and race discrimination because he was minimally qualified for the positions of Director of the CND and Neighborhood Planner, the University's decisions to employ better qualified candidates for those positions were legally sufficient, non-discriminatory reasons for rejecting Petitioner. The evidence submitted by

[1] Petitioner had originally pursued this action against the University and its Board of Trustees. The appeal, however, was only pursued against the University.

Petitioner in opposition to the motion failed to establish that the reasons advanced by the University were a pretext for race and/or age discrimination (R. 28: Memorandum of Opinion at 2, 4-9).

On September 24, 1990, Petitioner filed a Motion for Reconsideration and Relief from Judgment with the District Court, claiming that the District Court's decision was legally and factually unfounded, was arbitrary, capricious and an abuse of discretion and denied him his Due Process and Equal Protection Rights as well as his First Amendment right to freedom of speech, association and affiliation. As it had been the case in his response to the Motion for Summary Judgment, Petitioner attached to this post-judgment motion a rambling, incomprehensible brief and fragments of documents nowhere authenticated. The District Court denied Petitioner's motion on October 2, 1990 (R. 30: Motion for Reconsideration; R. 33: Marginal Entry Order).

Petitioner appealed to the U.S. Court of Appeals for the Sixth Circuit and sought to pursue the appeal *in forma pauperis*. His request was denied. In his *pro se* appeal brief, Petitioner claimed that the District Court's decision was not supported by the facts and was arbitrary, capricious and an abuse of discretion. In addition, Petitioner claimed for the first time that he was not hired for the position of Neighborhood Planner in retaliation for having filed prior charges of age and race discrimination against the University. Once again, Petitioner's brief contained a rambling discussion about his background and societal race discrimination, with quotes from documents nowhere authenticated. Petitioner's brief also contained blanket claims that the

District Court had engaged in a "flagrant violation of Plaintiff's right to Due Process and Equal Protection of the Ohio and U.S. Constitution" (sic).

The Court of Appeals affirmed the District Court's finding that, on the University's Motion for Summary Judgment, Petitioner "did not establish the existence of any genuine issue of material fact" within the meaning of *Anderson v. Liberty Lobby, Inc., supra.* The Court of Appeals declined to address Petitioner's retaliation claim because it had not been first presented to the District Court (May 2, 1991 Order at 2).

Contrary to Petitioner's repeated contentions in his Petition for a Writ of Certiorari, the critical issue of fact on the University's Motion for Summary Judgment was not whether the University was aware of Petitioner's race. The District Court found that even if Petitioner's race could, by inference, have been known to the University, this fact alone did not establish that the reasons for rejecting Petitioner's applications were a pretext for race discrimination (R. 28: Memorandum of Opinion at 7). The same was true with respect to Petitioner's claims that the University, by inference, knew his age (*Id.* at 8-9). The District Court found that Petitioner had failed to show by competent evidence that the reasons for the University's rejection of his application were a pretext for age discrimination (*Id.*). The District Court, in fact, gave Petitioner the benefit of the doubt by finding that he had established a *prima facie* case under Title VII and under the ADEA. Petitioner's claims failed because he could not meet his ultimate burden of persuasion under the applicable employment discrimination laws. Specifically, the District Court found that "a reasonable jury could not return a verdict for [Petitioner] because he does not offer

enough evidence to show that the University's reason for rejecting him is a pretext for intentional race discrimination" (*Id.* at 7-8). This was equally applicable to the age claim (*Id.* at 9). The Court of Appeals affirmed these findings.

Petitioner also seems to imply that the retaliation claim was improperly dismissed by the Court of Appeals. The record, however, is uncontroverted that the retaliation claim was never pled in the Amended Complaint and was not before the District Court. The retaliation claim, thus, could not be interjected into this case on appeal.

Given the rambling Petition for a Writ of Certiorari submitted by Petitioner, the University is unable to particularize in more detail the misstatements of fact contained therein. Petitioner's misstatements of law are discussed *infra* in connection with the reasons why the Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

Petitioner's contention that the standard for summary judgment set forth by this Court in *Anderson v. Liberty Lobby, Inc., supra*, "is strictly to be used in libel cases" is, in plain English, preposterous.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment *shall* be rendered

> "... if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment as a *matter of law.*" (Emphasis added).

The application of this rule was explained by this Court in *Celotex Corporation v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), where the Court held that:

> "... the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who *fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.* In such a situation, there can be 'no genuine issue as to any material fact,' since *a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.* The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an esential element of her case with respect to which she has the burden of proof ..." 477 U.S. at 322-323 (Emphasis added).

The "genuine issue of material fact" language of Rule 56 was interpreted by this Court in *Anderson v. Liberty Lobby, Inc., supra*, decided the same day as *Celotex Corporation*. Noting that the very language of

Rule 56 provided that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, this Court held that the *substantive law* of the cause of action at issue "will identify which facts are *material*." 477 U.S. at 248 (Emphasis added). It explained:

> "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Factual disputes that are irrelevant or unnecessary will not be counted.* See generally 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, *it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.*" *Id.* (Emphasis added).

The Court went on to explain that a dispute about a material fact is "genuine" for purposes of Rule 56 if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* The Court's function under Rule 56 is not to weigh the evidence and determine the truth of the matter, but to determine whether there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.* at 249.

This Court has also held that, in opposing a motion for summary judgment, the respondent must "do more than simply show that there is some metaphysical doubt as to the material facts". *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L.

Ed. 2d 538, 106 S. Ct. 1348 (1986). If the record "taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'." *Id.* at 587 (Citation omitted). As recognized by this Court in *Matsushita*, the District Court has at least some discretion to determine whether the nonmoving party's claim is "implausible". *Id.* If the factual context renders the nonmoving party's claim implausible, the nonmoving party "must come forward with more persuasive evidence to support [his] claim than would otherwise be necessary". *Id.*

In applying these principles to this case, the District Court properly found that Petitioner had failed to come forward with specific, significantly probative evidence sufficient to support a claim for either race or age discrimination in employment. The U.S. Court of Appeals for the Sixth Circuit agreed.

1. **Race Claim**

In a Title VII action, the employee has the ultimate burden of proving that the employer discriminated against him because of his race. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978) ("*Furnco*"); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 58 L. Ed. 2d 216, 99 S. Ct. 295 (1978) ("*Sweeney*"); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981) ("*Burdine*"); and *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983) ("*Aikens*").

In a disparate treatment case such as this, the employee must first establish a *prima facie* case by proving facts which, if unexplained, would be sufficient to infer unlawful discrimination. Thereafter, the burden of coming forward shifts to the employer to articulate some legitimate, non-discriminatory reasons for its actions. *McDonnell Douglas; Furnco; Sweeney; Burdine;* and *Aikens.* The employer need not go beyond this and prove the absence of discrimination. *McDonnell Douglas; Furnco; Sweeney; Burdine;* and *Aikens.* If the employer merely articulates legitimate reasons for its actions, the employee must demonstrate by competent evidence that the employer's explanation is a pretext for discrimination. *McDonnell Douglas; Furnco; Sweeney; Burdine;* and *Aikens.*

In *McDonnell Douglas,* this Court set forth the standard for a *prima facie* case of racial discrimination in hiring. Under this standard, the applicant must show:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

If the applicant establishes a *prima facie* case, the employer must articulate, through admissible evidence, a legally sufficient basis for the applicant's rejection. *Burdine,* 450 U.S. at 255. That is, the employer must merely prove "that he based his employment decison on a legitimate consideration, and not an illegitimate one such as race". *Furnco,* 438 U.S. at 577. Thus, under Title VII, "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria". *Burdine,* 450 U.S. at 259.

With respect to Petitioner's application for the position of Director of the CND, the most cursory review of the qualifications of Petitioner and the five finalists for that position shows that Petitioner's qualifications were far inferior. By way of illustration, the years of relevant experience of the five finalists who were interviewed for the position and Petitioner is summarized as follows:

Candidate	*Relevant Experience*
Star	13 years
Wilbur	12 years
Cowell	13 years
Meyer	18 years
Hill	18 years
Petitioner	4 years

In addition, while all five finalists were currently active in the requisite field, Petitioner's four years of relevant experience had been obtained approximately sixteen years before he applied for the position. The application submitted by Petitioner was, indeed, quite unclear as to his background. In a three-year period, he presumably attended two academic institutions in Cleveland while earning an L.L.B. in Boston, which he allegedly obtained in 1956. No information was supplied for his occupation between 1956 and 1968. He listed his last occupation, since 1976, as a "general contractor" building new homes—rehabilitation in Decatur, Alabama and Greater Cleveland.

Clearly, the six-person Search Committee involved in the selection of the Director of the CND, which included a black, as well as the Director of the Urban Center and the Dean of the College of Urban Affairs, who approved the Search Committee's recommendation, acted according to objective criteria without regard to race.

As to the position of Neighborhood Planner, the individual selected to fill this position *is a black female.*

The District Court in considering Petitioner's race discrimination claim defined the issue to be "whether the record contains evidence from which the trier of fact could infer that the University discriminated against [Petitioner] because of his race." In answering this inquiry, the District Court found that Petitioner satisfied the initial prong of the *McDonnell Douglas* test and established a *prima facie* case of race discrimination. In measuring the University's legally sufficient, non-discriminatory reason for its action, the District Court concluded that the evidence overwhelmingly established that the reason the University did not hire Petitioner was that his qualifications were inferior to the other candidates. Therefore, the University's decision to employ a better qualified candidate was a legally sufficient, non-discriminatory reason for rejecting Petitioner. Moreover, the individual hired for one of the positions in question is black. Considering all evidence in the light most favorable to Petitioner, the District Court correctly found that Petitioner had failed to establish pretext within the meaning of Title VII. The Court of Appeals, properly applying the *Anderson v. Liberty Lobby, inc., supra,* standard, correctly affirmed the District Court's findings.

2. Age Claim

The summary judgment standards applicable to the Title VII claim are equally applicable to Petitioner's age discrimination claim. ADEA plaintiffs have the burden of proving by a preponderance of the evidence that age was a factor in the adverse employment decision and that such factor in fact made a difference in the

employment action at issue. *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983); and *Kendall v. Hoover Co.*, 751 F.2d 171 (6th Cir. 1984). In determining ADEA cases, courts have adopted the burden of proof applicable to Title VII cases. Upon a *prima facie* showing by the plaintiff, only the burden of going forward with the evidence shifts to the employer. Once the employer comes forward with evidence that the challenged decision was based on reasonable factors other than age, the plaintiff must still bear the ultimate burden of proving by a preponderance of the evidence that the employer discriminated against him because of his age. *Laugesen, supra; Blackwell, supra;* and *Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299 (E.D. Mich. 1976). Unless the plaintiff produces additional evidence which shows that the reason articulated by the employer is a pretext for age discrimination, the action fails. *Blackwell, supra; Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982); *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983); and *Elliott v. Group Medical and Surgical Service*, 714 F.2d 556 (5th Cir. 1983), *reh. den.*, 721 F.2d 819, *cert. den.*, 467 U.S. 1215 (1984).

In this case, the Search Committee for the selection of the Director of the CND consisted of six individuals. The known ages of four of these individuals were 60, 54, 50 and 38. The other two members were in their mid-forties. This Committee selected 5 individuals for interviews and, to the University's best knowledge, four of the finalists were over forty years of age. Petitioner was not among the finalists because his qualifications were inferior.

As correctly found by the District Court, the selection of candidate Star, who was 41 years old at the time of hire, as the Director of the CND was based on legitimate non-discriminatory academic reasons. The Center for Neighborhood Development is one of the several major programs of applied research, training, technical assistance and data base development conducted by the Urban Center of the University's College of Urban Affairs. Its director must be able to manage the professional and support staff, along with the student and faculty support from the Department of Urban Studies. As previously stated, Petitioner's credentials are in no way comparable to Star's credentials or the credentials of the other four finalists for this position.

The same is true with respect to Petitioner's application for the position of Neighborhood Planner. Petitioner's qualifications were nowhere near to the qualifications of the seven finalists for this position. By way of illustration, the related degree and relevant years of experience of the candidates for this position are summarized as follows:

Candidate	*Related Degree*	*Relevant Experience*
Batth	B.A.	5 years
Anderson	M.A.	4 years
Kelley	M. Urban Planning	4 years
Krause	B.A.	4 years
Popa	B.A.	5 years
Rhines	B.A.	4 years
White	M.S.	2 years
Petitioner	Unknown	4 years

Petitioner had not worked in the requisite field since the mid-70s. The individuals involved in the process of reviewing sixty-one applications for the position applied objective criteria without regard to age. The individual selected, Batth, a thirty-four year old black female, had a Bachelor's degree in Urban Studies (Urban Planning) from Oberlin College and had successfully completed the undergraduate program in Urban Planning at the Institute for Architecture and Urban Studies in New York City. She had five years of experience as a neighborhood planner, including two years as a neighborhood planner for the City of Cleveland where she gained experience with many Cleveland neighborhoods.

The District Court properly found that Petitioner was not invited to interview for either of the two positions at issue because his qualifications were inferior to the qualifications of other applicants, not because of his age. In addition, the District Court took into account the fact that the man hired for the position of Director for the CND was also within the protected age group. On the record before it, the District Court was satisfied that there was no genuine issue of material fact supporting the allegation that Petitioner was a victim of age discrimination.

The evidence being overwhelmingly against Petitioner, the Court of Appeals properly affirmed the District Court's findings.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed May 2, 1991)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 90-3940

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEWIS G. ROBINSON,
Plaintiff-Appellant,

v.

CLEVELAND STATE UNIVERSITY;
BOARD OF TRUSTEES OF CLEVELAND
STATE UNIVERSITY,
Defendants-Appellees.

ORDER

BEFORE: KRUPANSKY and BOGGS, *Circuit Judges,* and DUGGAN, *District Judge.**

This pro se appellant, Lewis G. Robinson, appeals from the district court's order granting summary judgment in favor of the defendants, Cleveland State University and its Board of Trustees, in this suit brought pursuant to 42 U.S.C. §2000e, et seq., Title VII

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* The Honorable Patrick J. Duggan, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

of the Civil Rights Act of 1964, and 29 U.S.C. §621, et seq., the Age Discrimination in Employment Act of 1967. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and the record, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Robinson, a black male over 50 years of age, alleged that he was denied employment with the Urban Center at the University's College of Urban Affairs on the basis of his race and age. Robinson alleged that between 1987 and 1989, he applied for six positions of employment with the Urban Center. The University only has a record of five applications. Robinson only filed charges of alleged employment discrimination against the University with the Equal Employment Opportunity Commission (EEOC) with respect to two of the positions he applied for: Director of the Center for Neighborhood Development and Neighborhood Planner. The EEOC issued Robinson a right-to-sue letter with respect to those two positions.

In his suit against the defendants, Robinson alleged that he was fully qualified for these positions and was denied them because of his race and age. He sought monetary damages and further requested a mandatory order requiring the University to employ him in the first available position for which he is minimally qualified.

The defendants filed a motion for summary judgment, with supporting attachments, alleging that there was no evidence that defendants' decisions were taken for discriminatory purposes. After reviewing the defendants' motion and Robinson's response, the district court granted the motion. Robinson's subsequent motion

for reconsideration was denied in a marginal order entered October 2, 1990. Robinson disagrees with the district court's decision and brings this timely appeal.

Upon consideration, we conclude that summary judgment on Robinson's claims was proper, as Robinson did not establish the existence of any genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Moreover, the additional claim of retaliation presented on appeal will not be addressed as it was not first presented in the district court for consideration. *See White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990).

Accordingly, the order of the district court is affirmed under Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT

(Issued September 13, 1990)

Case No. 1:89CVO258

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEWIS G. ROBINSON,
Plaintiff,

v.

CLEVELAND STATE UNIVERSITY,
et al.,
Defendants.

MEMORANDUM OF OPINION

JUDGE JOHN M. MANOS

On February 10, 1989, plaintiff Lewis G. Robinson filed the above-captioned case against defendants Cleveland State University and the Board of Trustees of Cleveland State University (collectively referred to as "the University") alleging that he was denied employment because of his race and age in violation of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e *et seq.* and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §621 *et seq.* The case is before the court on the University's motion for summary judgment. For the following reasons, the motion is granted, and the case is dismissed.

I.

Between 1987 and 1989, Robinson applied for six positions of employment at the University's Urban Center in the College of Urban Affairs.[1] He claims he was qualified for each position. Nonetheless, the University neither interviewed nor hired him.

Robinson filed charges of discrimination based on race and age with the EEOC,[2] alleging that his failure to secure employment with the University as a Neighborhood Planner or Director of the Center for Neighborhood Development ("Director") resulted from age and race discrimination. Because Robinson only filed EEOC claims for being denied these two positions, only these positions will be discussed below.

II. Summary Judgment

The purpose of summary judgment is "to isolate and dispose of factually unsupported claims. . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). It protects the rights of persons opposing claims with no factual basis. *Id.* at 328, 106 S. Ct. at 2555. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c).

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[1] While Robinson claims he applied for six positions, the University only has a record of five applications.

[2] Before bringing a race or age employment discrimination suit, a plaintiff must first file a charge with the Equal Employment Opportunity Commission ("EEOC"). 42 U.S.C. §2000e-5(e); 29 U.S.C. §626(d).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by either presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. at 325, 106 S. Ct. at 2554.

If the movant meets this burden, the non-movant must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56 (e). The substantive law identifies which specific facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552.

The non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. *Anderson*, 477 U.S. at 247-48, 106 S. Ct. at 2510.

III. The Race Discrimination Claim

Title VII prohibits race discrimination in employment. 42 U.S.C. §2000e *et seq.* The issue here is whether the record contains evidence from which the trier of fact could infer that the University discriminated against Robinson because of his race. When an

employment discrimination suit is considered for summary judgment, the stages of Title VII proof must be "telescoped." *McKenzie v. Sawyer,* 684 F.2d 62, 71 (D.C. Cir. 1982).

The parties to an employment discrimination action must fulfill the burdens of proof allocated by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817 (1973). First, the plaintiff must establish a prima facie case by a preponderance of the evidence. If the plaintiff succeeds, the burden shifts to the employer who must articulate a "legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 803, 93 S. Ct. at 1824. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 255, 101 S. Ct. 1089, 1094 (1981). If the defendant succeeds, the presumption of discrimination flowing from the prima facie case is dropped. *Burdine,* 450 U.S. at 256, 101 S. Ct. at 1095. Finally, the plaintiff is afforded the opportunity to show that the employer's justification is a pretext for discrimination prohibited by Title VII. *McDonnell Douglas,* 411 U.S. at 805, 93 S. Ct. at 1825. The ultimate burden of persuasion remains at all times with the plaintiff. *Burdine,* 450 U.S. at 256, 101 S. Ct. at 1097.

A. Prima Facie Case

To establish a prima facie case of race discrimination, the plaintiff must show by a preponderance of the evidence:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 803, 93 S. Ct. at 1824.

Robinson belongs to a racial minority. He applied for the positions of Director and Neighborhood Planner and claims to have the minimum required qualifications for each position. Nonetheless, Robinson was denied both positions. After his rejection, he claims the positions were filled by individuals with comparable experience. Therefore, he has established a prima facie case of race discrimination.

B. Legally Sufficient, Non-discriminatory Reasons

If a prima facie case is made, the burden shifts to the defendant who must present a legally sufficient, non-discriminatory reason for its action. *Burdine,* 450 U.S. at 255, 101 S. Ct. at 1094. The presumption of race discrimination established by Robinson's prima facie case is nullified by the University's explanation for its hiring decision.

The University asserts that race was not a factor in its decision. Robinson, like most applicants, was not required to disclose his race or age on his application. Affidavit of David Garrison at 1-2. He never interviewed at the center. Therefore, the defendants argue that they had no basis to form any belief about the plaintiff's race.

The University alleges that they select employees based on merit, not race. They claim that Robinson did not meet the minimum qualifications necessary for the positions to which he applied and was far less qualified than the candidates selected. The University required a degree in urban planning as a minimum qualification for both positions. The resume Robinson submitted to the University does not mention such a degree. The candidates selected both have degrees in urban planning, and their qualifications, exceeded Robinson's by far. Therefore, Robinson was rejected because of his

inexperience and minimal qualifications, not because of his race. Moreover, the woman chosen to fill the position of Neighborhood Planner is black. The record contains no evidence that Robinson was denied employment at the University because of his race. The University chose not to interview or hire Robinson because his qualifications were inferior to those of other candidates. Title VII is not meant to challenge or diminish "lawful traditional management prerogatives in choosing among qualified candidates." *Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir. 1987). Therefore, the University's decision to employ a better qualified candidate is a legally sufficient, non-discriminatory reason for rejecting Robinson.

C. Pretext

The burden of showing that defendant's proffered reasons were pretextual requires the plaintiff to establish that he was a victim of intentional discrimination. *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095. In a Title VII action, the court must examine "the employer's motivation, not the applicant's perceptions, or even an objective assessment, of what qualifications are required for a particular position." *Wrenn*, 808 F.2d at 502.

Robinson produces little evidence suggesting that the University discriminated against him and that the articulated reason for not hiring him was pretextual.[3] He attempts to refute the defendants' allegation that they had no basis for knowing his race by arguing that it could be easily surmised from information in his resume, namely work experience in Hough and references who are prominent in the black community. He also claims to have visited Cleveland State for reasons relating to his application for employment and his consulting business.

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[3] Robinson's motion in opposition to the defendant's motion for summary judgment does not address the issue of pretext.

Response to Motion to Dismiss at 6. Further, he believes that he is more qualified than the candidates selected for the positions.

Nonetheless, Robinson is required to offer more than evidence showing that the University's proffered reasons were not "true or entire" explanations for the decision. *White v. Vathally*, 732 F.2d 1037, 1042 (1st Cir. 1984), *cert. denied*, 469 U.S. 933, 105 S. Ct. 331 (1984). He must point to evidence that the reasons were a pretext for intentional discrimination. *Id.* Simply disputing the facts that substantiate the hiring decision is not sufficient to carry his burden. *Irvin v. Airco Carbide*, 837 F.2d 724, 726 (6th Cir. 1987). Robinson's perception of his competence is immaterial under Title VII. *Wrenn*, 808 F.2d at 502.

Although he has produced some evidence to rebut the University's reason for denying him employment, there is no genuine issue for trial. A reasonable jury could not return a verdict for Robinson because he does not offer enough evidence to show that the University's reason for rejecting him is a pretext for intentional race discrimination. Summary judgment is proper when the non-movant's proffered evidence is "merely colorable" or "is not significantly probative." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2511 (1986). While Robinson presented some evidence to substantiate his claim, the University offered a substantial amount of evidence showing that Robinson was not as qualified to fill the positions as the candidates selected. Because the plaintiff's evidence is not sufficient to create a genuine issue of material fact, the University is entitled to judgment as a matter of law, and summary judgment is granted on the race discrimination claim.

IV. Age Discrimination Claim

The Age Discrimination in Employment Act of 1967 ("ADEA") prohibits employment discrimination based on age. The Sixth Circuit prefers deciding ADEA claims case-by-case rather than formally defining a prima facie case of age discrimination. *Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1118 n. 3 (6th Cir. 1980). The ultimate issue is "whether age was a factor" that "made a difference" in the employment decision. *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982).

As stated earlier, the record shows that Robinson was not invited to interview for either position because his qualifications were inferior to the qualifications of other applicants. The University asserts that age was not a factor in their decision. They substantiate this claim by indicating that the man chosen to fill the position of Director was also within the age group protected by the ADEA.

Because there is no genuine issue of material fact supporting the allegation that Robinson was the victim of age discrimination, the University's motion for summary judgment is granted.

V.

In sum, Robinson has not supported his claims of race or age discrimination with enough evidence to establish a genuine issue of material fact. Accordingly, the University's motion for summary judgment is granted, and the case is dismissed.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

Case No. 1:89CVO258

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEWIS G. ROBINSON,
Plaintiff,

v.

CLEVELAND STATE UNIVERSITY,
et al.,
Defendants.

ORDER

JUDGE JOHN M. MANOS

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the motion for summary judgment brought by defendants Cleveland State University and the Board of Trustees of Cleveland State University is granted, and the case is dismissed.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge